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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF PETITIONER WESTVACO CORPORATION IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted by Petitioner Westvaco Corporation in response to the Brief for the United States as Amicus Curiae ("Brief") filed on June 2, 1980.

The United States recommends that Westvaco's petition for a writ of certiorari should be granted because of the "very real conflict [that] exists on the general issue of contribution" (Brief at 15) and the desirability

of "much-needed guidance to the lower courts" (*Id.* at 16) in resolving the contribution question. We, of course, agree.

While the United States urges the granting of the petition, it speculates that the Eighth Circuit might have reached the same result in this case as the Fifth Circuit did below because (1) the present case is a price-fixing case in which some defendants have settled and (2) price fixing is "an obviously intentional antitrust violation" (*Id.* at 15). Neither of these purported distinctions provides a basis for distinguishing the fundamentally conflicting decisions of the Fifth and Eighth Circuits:

1. It is pointless for the United States to speculate regarding how the Eighth Circuit would have disposed of the present case if it had applied the principles of its decision in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). The only actual indication of the reach of that decision points precisely in the opposite direction. In *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,059 (E.D. Ark. 1979), the court concluded that *Beauty Supply* applied to a price-fixing case in the context of a settlement to require "release [of] nonsettling defendants from liability for the settling defendant's actions" (*Id.* at 77,252). *See* 937 ANTITRUST & TRADE REG. REP. (BNA) A-30 (Nov. 1, 1979).

2. The suggestion by the United States that there may be a distinction between "intentional" and "unintentional" violations for purposes of contribution is unacceptable and, in any event, irrelevant to the question of whether the petition should be granted. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978), this Court held that intent was an element of a criminal antitrust offense but specifically noted that its analysis

"leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." Furthermore, the possibility of distinguishing between "intentional" and "unintentional" violations for purposes of contribution has been rejected in a thoughtful law review article published only recently. *See* Note, "Contribution in Private Antitrust Actions," 93 Harv. L. Rev. 1540, 1546-48 (1980). This Note concludes, after a thorough and scholarly analysis of all arguments, that contribution in price-fixing cases should be permitted. *See also* Recent Developments, "Contribution Among Antitrust Defendants," 33 Vand. L. Rev. 979 (1980).

At this stage, of course, this Court need not resolve the merits of the arguments presented by the respective parties or the United States. It is sufficient to say, as urged by the United States, that certiorari should be granted in view of the conflicting decisions of the federal appellate courts, the necessity for a uniform federal rule, and the need for an authoritative resolution of this critically important issue.

Respectfully submitted,

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